

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL DENTON,

Plaintiff,

v.

TIM THRASHER, et al.,

Defendants.

CASE NO. 3:18-CV-5017-BHS-DWC

ORDER

The District Court has referred this 42 U.S.C. § 1983 action to United States Magistrate Judge David W. Christel. On December 5, 2019, Plaintiff Michael Denton, filed a Motion for Summary Judgment (“Plaintiff’s Motion”). Dkt. 120. The same day, Defendants filed a Motion for Summary Judgment (“Defendants’ Motion”). Dkt. 121. After considering the Motions and record, the undersigned issued a Report and Recommendation (“R&R”) recommending Plaintiff’s Motion be denied and Defendants’ Motion be granted. *See* Dkt. 137.

On June 29, 2020, the Honorable Benjamin H. Settle, the District Judge assigned to this case, entered an Order adopting the R&R in part and requesting supplemental briefing on the issue of exhaustion. Dkt. 142. On September 14, 2020, Judge Settle declined to adopt the R&R

1 on the issue of exhaustion as to the January 1, 2018 grievance and re-referred the matter to the  
2 undersigned for further consideration. Dkt. 146.

3 The undersigned then directed the parties to submit a joint status report on or before  
4 October 22, 2020 advising the undersigned: (1) whether Defendants' Motion should be reopened  
5 or whether the parties anticipate filing renewed dispositive motions and (2) whether additional  
6 discovery is necessary, and if so, the scope of any additional discovery. Dkt. 147.

7 On October 22, 2020, the parties filed the Joint Status Report. Dkt. 148. Defendants'  
8 position is prior to ruling on the merits of the remaining claims, the Court must first resolve the  
9 disputed questions of fact regarding exhaustion. Dkt. 148 at 1 (citing *Albino v. Baca*, 747 F.3d  
10 1162, 1170-71 (9th Cir. 2014)). Defendants argue the Court should hold an evidentiary hearing  
11 to resolve the disputed factual issues related to exhaustion. *Id.* Plaintiff's position is Defendants  
12 failed to establish as a matter of law that administrative remedies were available to Plaintiff. Dkt.  
13 148 at 1-2. Therefore, Plaintiff argues the Court should rule on the underlying claims in this case.  
14 *Id.* The parties agree if evidentiary hearing is required, then discovery should be reopened for a  
15 period of 60 days. Dkt. 148 at 2.

16 Exhaustion is a threshold issue which "should be decided, if feasible, before reaching the  
17 merits of a prisoner's claim." *Albino v. Baca*, 747 F.3d 1162, 1170-71 (9th Cir. 2014). In *Albino*,  
18 the Ninth Circuit held that "[i]f a motion for summary judgment is denied, disputed factual  
19 questions relevant to exhaustion should be decided by the judge, in the same manner a judge  
20 rather than a jury decides disputed factual questions relevant to jurisdiction and venue. *Id.*; *See*  
21 *also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188-190 (1936) (with respect to  
22 subject-matter jurisdiction, the Supreme Court indicated it may "inquire into the facts as they  
23 really exist[]"); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139-1140 (9th Cir. 2004)

1 (venue); *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987) (with respect to personal jurisdiction,  
2 the Supreme Court held courts “ha[ve] the discretion to evidence at a preliminary hearing in  
3 order to resolve any questions of credibility or fact[.]”).

4 Here, the threshold issue is whether Defendants’ failure to respond to Plaintiff’s  
5 perceived emergency medical grievance rendered the grievance process effectively unavailable.  
6 See Dkt. 146. Judge Settle denied Defendants’ Motion because the evidence, viewed in the light  
7 most favorable to Plaintiff, raised a genuine dispute about whether any administrative process  
8 was available to Plaintiff to appeal what he believed was an emergency medical grievance. Dkt.  
9 146 at 3-5. Judge Settle stated “[i]f the factfinder accepts Denton’s allegation that he never  
10 received a response, then the reasonable conclusion follows that a three-day delay in failing to  
11 respond to an emergency grievance demonstrates that no available administrative remedy was  
12 available.” Dkt. 146 at 4-5.

13 Because exhaustion is a threshold issue which should be decided, if feasible, before  
14 reaching the merits of a prisoner’s claim, *Albino*, 747 F.3d at 1170, the undersigned reopens  
15 discovery, limited to the issue of exhaustion as to the January 1, 2018 grievance. See Dkt. 148 at  
16 2 (parties agree if an evidentiary hearing is needed, discovery should be reopened); *Ransom v.*  
17 *Aguirre*, 2016 WL 10646321, at \*1 (E.D. Cal. Mar. 11, 2016), *report and recommendation*  
18 *adopted*, 2016 WL 10644771 (E.D. Cal. July 27, 2016) (the district court issued findings and  
19 recommendations recommending a motion for summary judgment be denied pending an  
20 evidentiary hearing on the issue of exhaustion).

21 Accordingly, the Court orders:

22 (1) Discovery, limited to the issue of exhaustion of the January 1, 2018 grievance, shall  
23 be completed on or before January 15, 2021.  
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1 (2) Any motion to compel discovery shall be filed not later than February 1, 2021.

2 (3) As the discovery period may impact Defendants' request for an evidentiary hearing  
3 and/or the parties may be able to narrow or resolve the issue of exhaustion, the parties  
4 are directed to meet and confer and provide the Court with a second joint status report  
5 on or before February 15, 2021. Defendants' may also renew their request for an  
6 evidentiary hearing in addition to filing the second joint status report on or before  
7 February 15, 2021.

8 Dated this 12th day of November, 2020.

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11 David W. Christel  
12 United States Magistrate Judge  
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